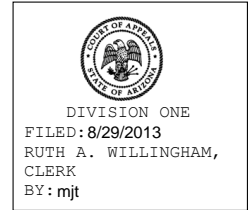


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Matter of: ) No. 1 CA-CV 12-0671  
)  
PERRY C. REDDEN FAMILY TRUST, ) DEPARTMENT D  
Under Agreement dated February )  
13, 1980, and Amendments ) **MEMORANDUM DECISION**  
Thereeto. ) (Not for Publication -  
) Rule 28, Arizona Rules  
\_\_\_\_\_ ) of Civil Appellate  
RAQUEL L. YOUNG; LAURA L. REDDEN; ) Procedure)  
CYNTHIA LOUISE REDDEN-HALL; )  
SUZANNE PETTY; SETH REDDEN; )  
CAMERON REDDEN; DEBBIE FULTON; )  
and ERIK BOWERS, )  
)  
Plaintiffs/Appellants, )  
)  
v. )  
)  
JUDITH BOWERS, as Successor )  
Trustee; TAMARA BEATSON; DORINDA )  
BOWERS; and MICHELLE SOMMER, )  
)  
Defendants/Appellees. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. PB2003-004879

The Honorable Robert D. Myers, Judge (Retired)

**AFFIRMED**

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Brunn W. Roysden, Jr. Goodyear  
Attorney for Plaintiffs/Appellants

Curley & Allison, LLP Phoenix  
By Roger D. Curley  
Kiernan S. Curley  
Attorneys for Defendant/Appellee Judith Bowers

Frazer, Ryan, Goldberg & Arnold, LLP Phoenix  
By Timothy James Ryan  
John R. Fitzpatrick  
Attorneys for Appellees/Defendants Tamara Beatson,  
Dorinda Bowers and Michelle Sommers

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**D O W N I E**, Judge

¶1 Beneficiaries of the Perry C. Redden Family Trust ("Trust") appeal certain orders of the probate court. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 Over the course of protracted probate litigation, certain Trust beneficiaries have aligned into two groups -- the "Redden Group" and the "Bowers Group."<sup>1</sup> In May 2010, the beneficiaries reached an agreement resolving their disputes ("May 2010 Agreement"). When they could not agree on final terms, Trustee filed a petition to enforce the May 2010

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<sup>1</sup> The Redden Group includes Erik Bowers, Debbie Fulton, Raquel L. Young, Laura L. Redden, Suzanne Petty, Seth Redden, Cameron Redden, Cynthia Redden-Hall, and Robert Bowers. The Bowers Group consists of Tamara Beatson, Dorinda Bowers, Michelle Sommer, and Judith Bowers. Judith Bowers is also the Trustee. For clarity, we refer to her by title rather than name.

Agreement, and three members of the Bowers Group ("Three Bowers")<sup>2</sup> joined with Trustee. The petition asked the court to, *inter alia*, distribute Trust assets according to the May 2010 Agreement and order payment for Trustee's attorneys' fees and fiduciary services.

¶13 After an evidentiary hearing, the probate court ruled that the May 2010 Agreement was valid and binding and confirmed its allocation of Trust assets among the beneficiaries. The court ordered Trustee and her counsel to file statements detailing fees incurred after March 1, 2010 ("Rule 33 Affidavits"), which they did. See Ariz. R. Prob. P. ("Probate Rule") 33 (compensation for fiduciaries and attorneys). The Redden Group filed numerous objections, questioning Trustee's actions and the reasonableness of the fees sought. The Three Bowers supported the Rule 33 Affidavits, but urged the court to allocate payment solely to the Redden Group based on its "repeated and continued objections and refusals to honor" the May 2010 Agreement and because the Redden Group's "claims were without substantial justification, constituted harassment, and were meant only to delay and expand the proceedings."

¶14 The court approved the attorneys' fees request, but declined to apportion those fees solely to the Redden Group. The court, however, labeled the Redden Group's objections to the

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<sup>2</sup> Tamara Beatson, Dorinda Bowers, and Michelle Sommer.

fiduciary fees request "absolutely barren of any evidence" and ordered that those fees "be paid to the Trustee from the trust resources due and payable to the Redden Grandchildren and Deborah and Erik Bowers" pursuant to Arizona Revised Statutes ("A.R.S.") Sections 12-341.01 and 14-11004. Meanwhile, the Redden Group had stipulated to an attachment of its assets, granting its former counsel, Alvarez & Gilbert, the "first \$75,000.00 of distributions to which Redden Grandchildren are entitled" ("A&G Allocation").

¶15 As the litigation progressed, the Redden Group continued to challenge Trustee's actions, including her treatment of certain gold and silver coins. In August 2011, Trustee filed an "Amended Petition for Determination Whether Actions of Trustee Were Appropriate," asking the court to, *inter alia*, approve additional attorneys' fees and expenses. The Three Bowers supported the request, but claimed most of the fees were incurred in responding to Redden Group filings. They asked the court to allocate responsibility, minus a small amount related to trust administration, to the Redden Group pursuant to A.R.S. § 14-11004(B).

¶16 In September 2011, the court conducted a two-day evidentiary hearing on Trustee's petition. In a signed order entered September 30 ("September 30 Order"), the court reaffirmed the terms of the May 2010 Agreement and prior rulings

relating to that agreement. The court ruled Trustee had not breached her fiduciary duties and concluded the requested Trust expenses and attorneys' fees were reasonable; that the attorneys' fees and costs were incurred to defend against the Redden Group's objections; and that the Redden Group "failed to present any evidence in connection with their objections." The court ordered Trustee's attorneys' fees and costs to be paid from assets of the Redden Group. Paragraph K of the September 30 Order states:

Insofar as the "Bowers Three" Petition for Allocation of Approved Attorneys' Fees is concerned, although there has not been a specific objection to it, it is denied. All payments requested by the Bowers Three are approved and shall be paid from the Trust assets as expenses incurred in connection with the defense of the attack on the [May 2010 Agreement].

¶17 Paragraph F confirmed the A&G Allocation and required Trustee to withhold \$12,500 from each Redden Group member's share. The court denied "[a]ny additional petitions, counter petitions or motions filed by the Redden Group" and included language of finality pursuant to Rule 54(b), Arizona Rules of Civil Procedure ("Rule").

¶18 Trustee divided the assets into the "Redden Sub-trust" and "Bowers Sub-trust" in accordance with the September 30 Order. The Redden Group filed a motion for new trial, which the

court denied. The Redden Group then filed a notice of appeal from the September 30 Order ("CV 11-0779").<sup>3</sup>

¶19 On November 15, 2011, the Redden Group filed a "Contingent Motion or Petition to Withdraw or Dismiss Appeal without prejudice to refile; Motion or Petition to Continue and Amend Rule 59 Motion; In the alternative, Rule 60 Motion or Petition for New Trial; Motion or Petition for Extension of Time for Discovery; Motion or Petition for Extension of time to File Civil Appeal Docketing Statement [sic]" ("Contingent Motion"). Trustee and the Three Bowers responded. Trustee asserted the Contingent Motion failed to offer any new evidence, was not a proper pleading, and was filed to harass Trustee and delay Trust distribution; Trustee asked the court to assess reasonable expenses and fees incurred in responding as a sanction. The Redden Group replied, and the probate court ruled:

[N]one of the relief sought by the Redden Group is well grounded in fact, it is not warranted by existing law and there is no good faith argument for it. . . .

It appears to the Court that the Redden Group's continued inappropriate filings at this point in the litigation is vexatious,

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<sup>3</sup> We take judicial notice of the record in CV 11-0779 and refer to it as necessary to resolve this appeal. See *Regan v. First Nat'l Bank*, 55 Ariz. 320, 327, 101 P.2d 214, 217 (1940) (courts may "take judicial notice of other actions involving similar parties and issues and of the pleadings therein"). In April 2013, this Court affirmed the probate court's orders in CV 11-0779. *In re Perry C. Redden Family Trust*, 1 CA-CV 11-0779, 2013 WL 1632500 (Ariz. App. Apr. 16, 2013) (mem. decision).

in violation of Rule 11 of the Arizona Rules of Civil Procedure and has been a burden to the Responding parties and the Court.

The court ordered the Redden Group to pay the requested fees and expenses and denied the Contingent Motion.<sup>4</sup>

¶10 On November 16, 2011, the Three Bowers submitted an itemized statement to Trustee, detailing \$40,620.97 in attorneys' fees and costs incurred in defending the May 2010 Agreement and requesting payment pursuant to the September 30 Order. Trustee sent a copy of the statement to the Redden Group. Counsel for the Redden Group responded by email that the fees were unreasonable and asserted that the September 30 Order "specifically denied" the fee request and made "what might be considered contradictory comments."

¶11 In the meantime, a request for distribution was filed by Alvarez and Gilbert. Trustee responded, alerting the court to, *inter alia*, a dispute over interpretation of Paragraph K, and advising of a shortfall in liquid assets sufficient to cover fees assessed against the Redden Group. Trustee suggested selling one or more properties in the Redden Sub-trust. Trustee asked the court for clarification of Paragraph K and

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<sup>4</sup> The Three Bowers filed a request for \$1,150.00 incurred in responding to the "Contingent Motion." The court, though, entered an order awarding them \$31,931.32 in fees and costs. Trustee filed a motion for clarification, and the court entered a modified order correcting the amount awarded to the Three Bowers.

instructions regarding payment of attorneys' fees. The Redden Group did not respond. The court declined to advise Trustee "how to carry out her duties and obligations."

¶12 In March 2012, Trustee filed a petition seeking additional attorneys' and fiduciary fees, as well as a Petition for Confirmation of Sale of Trust Real Property, noticing Trustee's intent to sell the "Bonita House" to rectify the cash shortfall in the Redden Sub-trust. The latter petition stated that a buyer had agreed to purchase the Bonita House, "subject to court approval and the Redden Group's right to match the purchase price." Trustee gave notice of the confirmation hearing pursuant to Probate Rule 9(D)(1). The Redden Group moved to dismiss both petitions, asserting the probate court lacked jurisdiction "due to the pending appeals." Trustee responded, and the court set a hearing. On May 1, the court granted both petitions. The Redden Group filed a motion for new trial, which the court denied.

¶13 On May 7, 2012, the Three Bowers filed an "Application for Approval and Order of Attorneys' Fees Awarded by Sept. 30, 2011 Order" (the "Application"). The Application claimed the Three Bowers were a "prevailing party to the Trust dispute arising from the May 2010 contract" and therefore were "awarded, pursuant to A.R.S. § 12-341.01 and A.R.S. § 14-11004(b), reasonable attorneys' fees" incurred in defending the agreement.



The Redden Group filed a "Rule 12 Motion to Dismiss Application for Attorneys Fees." The court denied the motion to dismiss, found the requested fees and costs reasonable, and ordered the Trust to pay them.

¶14 The Redden Group filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(9).

#### **DISCUSSION**

¶15 The Redden Group contends the probate court erred by: (1) awarding attorneys' fees and costs to the Three Bowers, (2) approving the sale of Trust property, and (3) awarding Trustee certain fees and costs. We address each argument in turn.

##### **I. The Three Bowers' Application**

¶16 In its Rule 12 motion to dismiss the Three Bowers' Application, the Redden Group argued: (1) A.R.S. § 14-11004 was an improper basis for a fee award; (2) the court lacked jurisdiction to consider the Application because an appeal was pending from the September 30 Order; and (3) the Application was made in violation of Rule 54(g). The Redden Group asserts these same arguments on appeal. It additionally contends the September 30 Order "does not save the application for fees" and that the court should have given it the "right to object to the substance of the attorney fee application" after denying the motion to dismiss.

**A. Section 14-11004**

¶17 The Redden Group argues the probate court improperly awarded fees to the Bowers Three pursuant to A.R.S. § 14-11004, which "applies only to a Trustee." We disagree.

¶18 "Statutory interpretation is a question of law that we review *de novo*." *Arpaio v. Steinle*, 201 Ariz. 353, 355, ¶ 5, 35 P.3d 114, 116 (App. 2001). "If the statute's language is clear and unambiguous, we give effect to that language and apply it without using other means of statutory construction, unless applying the literal language would lead to an absurd result." *Id.* "Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, *redundant*, or trivial." *Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) (alteration in original). Section 14-11004 provides:

A. A trustee or a person who is nominated as a trustee is entitled to reimbursement from the trust for that person's reasonable fees, expenses and disbursement, including attorney fees and costs, that arise out of and that relate to the good faith defense or prosecution of a judicial or alternative dispute resolution proceeding involving the administration of the trust, regardless of whether the defense or prosecution is successful.

B. A court or arbitrator may order that a party's reasonable fees, expenses and disbursements pursuant to subsection A be

paid by any other party or the trust that is the subject of the judicial proceeding.

¶19 Subsection (B) is not limited to trustees or persons nominated as trustees, and it authorized the fee award to the Three Bowers. If the legislature wanted to limit subsection (B)'s application to trustees or persons nominated as trustees, it presumably would have done so, just as it did in subsection (A). "Where the legislature has specifically used a term in certain places within a statute and excluded it in another place, courts will not read that term into the excluded section." *Banks v. Ariz. State Bd. of Pardons & Paroles*, 129 Ariz. 199, 203, 629 P.2d 1035, 1039 (App. 1981). Moreover, if we were to read the statute as the Redden Group suggests, subsection (B) would be superfluous.<sup>5</sup>

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<sup>5</sup> Although we need not rely on legislative history, the bill summary provides that A.R.S. § 14-11004

[s]tipulates that, in a judicial proceeding or alternative dispute resolution involving the administration of a trust, a trustee is entitled to reimbursement from the trust for reasonable fees, expenses and disbursement, including attorney fees and costs, regardless of whether the proceeding is successful. Also allows the court or arbitrator to award costs and expenses, including reasonable attorney fees, to any party to be paid by another party or from the trust that is subject of the controversy.

(Emphasis added.)

¶20 Furthermore, the Three Bowers asserted an additional statutory basis in the Application -- A.R.S. § 12-341.01, which permits a fee award to the successful party in a contested action arising out of contract. The Redden Group argues A.R.S. § 12-341.01 cannot support the fee award if it prevails in appeal CV 11-0779. The Redden Group, though, was unsuccessful in that appeal. See *Redden Family Trust*, 1 CA-CV 11-0779, at \*1, ¶ 1. Section 12-341.01 thus provides an alternative and independent basis for the fee award that the Redden Group has not challenged on substantive grounds.

#### **B. Jurisdiction**

¶21 The Redden Group relies on *Trebilcox v. Brown and Bain* to support its contention that the probate court was divested of jurisdiction once a notice of appeal was filed from the September 30 Order. 133 Ariz. 588, 589, 653 P.2d 45, 46 (App. 1982), *disapproved on other grounds by Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 524, 747 P.2d 1218, 1223 (1987). *Trebilcox*, though, was based on an earlier version of Rule 54(b). Rule 54(b) currently reads:

When more than one claim for relief is presented in an action . . . the court may direct the entry of final judgment as to one or more but fewer than all of the claims . . . For purposes of this subsection, a claim for attorneys' fees may be considered a separate claim from the related judgment regarding the merits of a cause.

See also Rule 54(b), Comm. Note (Under the rule, as amended, "[t]he trial court will retain jurisdiction to address the attorneys' fee issue after the appeal of a Rule 54(b) certified judgment on the merits. This amendment changes the result in *Trebilcox v. Brown & Bain* . . . which interpreted the prior version of Rule 54(b).").

¶122 The September 30 Order included Rule 54(b) language. The issue on appeal -- i.e., the "merits of [the] cause" -- was whether the Trustee breached her fiduciary duty. That issue was separate and distinct from the issue of the fee request. Also, the fees at issue were awarded pursuant to A.R.S. § 14-11004. A fee award under that statute is not contingent on whether the defense or prosecution of the trust matter is successful. See *In re Estate of Killen*, 188 Ariz. 569, 572, 937 P.2d 1375, 1378 (App. 1996) (court "retains jurisdiction to award fees even after an appeal has been taken when the award is not dependent on the outcome of an appeal").

¶123 Finally, as the Three Bowers note, even under *Trebilcox*, the failure to post a supersedeas bond would permit the superior court to liquidate an earlier fee award. 133 Ariz. at 590, 653 P.2d at 47 ("[I]n the absence of supersedeas the trial court in a civil proceeding retains jurisdiction to enforce the previously entered judgment pending appeal."); see also ARCAP 7(a)(1) ("[W]henver an appellant entitled thereto

desires a stay on appeal, he may obtain a stay by filing supersedeas bond . . . ."), (b) (when a supersedeas bond is filed, "execution of the judgment appealed from and all further proceedings thereon shall be stayed").

**C. Timeliness of Application**

¶24 Rule 54(g)(2) provides:

When attorneys' fees are claimed, the determination as to the claimed attorneys' fees shall be made after a decision on the merits of the cause. The motion for attorneys' fees shall be filed within 20 days from the clerk's mailing of a decision on the merits of the cause, *unless extended by the trial court.*

(Emphasis added.) "Interpretation of a rule of civil procedure is subject to *de novo* review." *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 479, ¶ 60, 224 P.3d 960, 976 (App. 2010).

¶25 Assuming the 20-day time limit applies here,<sup>6</sup> we find no reversible error. Rule 54(g)(2) "gives the trial court discretion to extend the time for requesting attorneys' fees, and the party seeking the fees need not request an extension prior to untimely filing its claim." *Aztar*, 223 Ariz. at 479,

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<sup>6</sup> The Three Bowers argue the 20-day limit did not apply because the probate court ruled on the merits and granted fees in the same order, negating the need to file a motion for fees contemplated by Rule 54(g)(2). They also argue the September 30 Order granted Trustee's fees as a sanction and suggest their fees would be similarly treated. See Rule 54(g)(4) (exempting sanction awards from 20-day rule). We need not resolve these contentions based on our determination that the probate court properly considered the fee application when presented.

¶ 60, 224 P.3d at 976. Based on discussions between the court and counsel at the May 1, 2012 hearing, the court implicitly approved the Three Bowers' stated plan to file a fee application pursuant to Paragraph K.<sup>7</sup> Although we do not encourage such lengthy delays, the Redden Group has identified no cognizable prejudice arising from the lapse in time, and it failed to make a record of prejudice in the probate court. The Redden Group has challenged the fee award on numerous grounds -- undermining its contention at oral argument that an appeal of the award would have been unnecessary had the Application been filed sooner. The probate court did not abuse its discretion in considering the Application when presented.

**D. Objections to Substance of Application**

¶126 Finally, the Redden Group contends the probate court should have offered it an opportunity to object to the substance of the Application after denying the motion to dismiss. The Application, though, was not a "petition." The Redden Group's filing of a Rule 12(b) motion was thus inappropriate. Had the Redden Group filed a proper response or objection, it could have raised its substantive concerns regarding the Application. Moreover, the record reveals that the Redden Group had multiple

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<sup>7</sup> Any confusion about the meaning and intent of Paragraph K became moot after the court reviewed and approved the Three Bowers' Application, fully aware of the parties' disagreement over the meaning of that portion of its September 30 Order.

opportunities to object to the fee request on substantive grounds but failed to do so.

## **II. Trustee's Petitions**

¶27 The Redden Group challenges the probate court's approval of the Bonita House sale because: (1) the court abused "[w]hatever" discretion or jurisdiction it had; (2) the court failed to abide by Probate Rules 17 and 28; (3) the Trustee did not present evidence that the house had to be sold; and (4) the court denied it due process by failing to provide a forum to determine and challenge facts. "Under the circumstances," the Redden Group concludes, the probate court should not have awarded Trustee her attorneys' fees and costs.

¶28 These arguments are presented in the opening brief in narrative fashion, without citation to substantive legal authorities. Opening briefs must present significant arguments, supported by authority, setting forth the appellant's position on the issues raised. See ARCAP 13(a)(6), (b)(1). The failure to so argue a claim usually constitutes abandonment and a waiver of that claim. See *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004); see also *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007). For example, the opening brief's discussion of Trustee's fee petition consists of five lines without a single citation to the record and no legal analysis. We therefore deem this issue



waived for purposes of appeal. We will address the arguments in the opening brief relating to the sale of the Bonita House, though they too have arguably been waived based on the failure to comply with ARCAP 13.

¶129 Trustee was not required to request or receive probate court approval to sell the Bonita House. Article 6.3 of the Trust states that the trustee has the power to “manage, control, grant option on, sell (for cash or on deferred payments), convey, exchange, dedicate to public use, partition, divide, subdivide, improve and repair trust property[.]” Additionally, the Petition for Confirmation of Sale of Trust Real Property was filed pursuant to Probate Rule 9(D), which dictates specific procedures for petitions to confirm the sale of real estate. The Redden Group asked only for a “scheduling conference,”<sup>8</sup> which Trustee argued was unnecessary given the purpose of the hearing -- i.e., to “find out what the highest bid is and get this done.”

¶130 The Redden Group contends the court denied it due process “by failing to provide a forum to determine and challenge facts.” As discussed *supra*, though, the Redden Group never asked for an evidentiary hearing, and it received considerably more input and protection than it was entitled to

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<sup>8</sup> In the alternative, the Redden Group sought an opportunity to purchase the property. It, however, declined to outbid the highest offer presented at the hearing.

under the Trust by virtue of Trustee's decision to seek court approval. Furthermore, the record reveals that the Redden Group used the hearing regarding confirmation of the property sale as a forum to air its grievances. It objected that the A&G Allocation did not need to be paid; objected to the timing of the sale and suggested Trustee was inappropriately selling in a soft market; challenged the sales price; and questioned whether Trustee was acting in the Trust's best interests in selling the property. The court heard and considered these issues before ruling. The Redden Group was not deprived of due process. See *Curtis v. Richardson*, 212 Ariz. 308, 312, ¶ 16, 131 P.3d 480, 484 (App. 2006) ("Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner.").

#### CONCLUSION

¶31 For the reasons stated, we affirm the judgment of the probate court. We deny the Redden Group's request for attorneys' fees incurred on appeal pursuant to A.R.S. §§ 12-341.01 and 14-11004. The Three Bowers request attorneys' fees and costs on appeal pursuant to A.R.S. §§ 14-11004(B) and 12-349. Contingent on compliance with ARCAP 21, we grant the Three Bowers' request for fees based on § 14-11004(B).

The fees and costs awarded to the Three Bowers shall be paid solely from Appellants' share of Trust assets.

/s/  
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/  
ANDREW W. GOULD, Presiding Judge

/s/  
PATRICIA A. OROZCO, Judge